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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 125

MORTON BERKOWITZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. B-1 to B-4) is reported at 214 F. Supp. 579. The opinion of the court of appeals (Pet. A-1 to A-6) is reported at 328 F. 2d 358.

### JURISDICTION

The judgment of the court of appeals was entered on February 5, 1964. (Pet. D-1.) A petition for re-

hearing was denied on March 23, 1964. (Pet. 2.) The petition for a writ of certiorari was filed on May 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a district court has power to order a transfer under 28 U.S.C. 1404(a), in the absence of personal jurisdiction over the defendant.

## STATUTE INVOLVED

28 U.S.C.:

SEC. 1404. *Change of venue.*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

* * * *

## STATEMENT

This action was brought by the United States to reduce to judgment a tax liability of $63,653.73, assessed against petitioner on May 31, 1956, by the District Director of Internal Revenue, Philadelphia, Pennsylvania. (R. 9a-10a.)[1] The complaint was filed on May 14, 1962, seventeen days prior to the running of the statute of limitations under 26 U.S.C. 6502(a)(1). (R. 1a.) At the time the assessment was

[1] Record (R.) references are to the consolidated appendix of appellant-petitioner in the court of appeals.

made, petitioner was living in Philadelphia. (R. 16a.) Process was served, not upon petitioner, but upon another individual at the Philadelphia address at which petitioner had been residing (R. 16a) and which was the last address he had made known to the District Director. (R. 33a.)

Petitioner filed a motion to dismiss (R. 15a) on the ground that he had not been served, with supporting affidavits (R. 16a-27a) that in 1960 he had married and moved to New York, where he now resides. Since the period provided in the statute of limitations had by this time expired, the government filed a motion, pursuant to 28 U.S.C. 1404(a), to transfer the action to the District Court for the Eastern District of New York. (R. 30a.) The district court determined that it had no power to effect a transfer under § 1404(a) because it had not acquired jurisdiction over the person of the defendant. (R. 35a-39a.) The court acknowledged that this had been held immaterial in *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, but limited that decision to transfers under 28 U.S.C. 1406(a). (R. 39a.) Accordingly, it entered an order denying the motion to transfer and granting the petitioner's motion to quash the return of process. (R. 39a.)[2]

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[2] The government then requested a transfer (R. 43a-44a) under § 1406(a), which was denied in an order and opinion dated March 27, 1963. (R. 68a-69a.) The court reasoned that, since the tax liability arose in the Eastern District of Pennsylvania, and since the tax returns were filed there, venue was properly laid in that district under 28 U.S.C. 1396. It concluded that the action could not be transferred under § 1406

The court of appeals reversed the order denying transfer under § 1404(a) and remanded to the district court to consider the merits of the motion to transfer. (Pet. A-6.) The court held that the rationale of this Court's decision in *Goldlawr* applies equally to transfer motions under § 1404(a), a companion section to § 1406(a) enacted at the same time and dealing with the same subject.[3]

## ARGUMENT

1. The decision below is correct and, contrary to petitioner's assertions, is in accord with decisions of the only other courts of appeals which have passed on the issue. *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F. 2d 514 (C.A. 4); *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (C.A. 5). The holding properly applies the rationale of this Court's decision in *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463. In *Goldlawr*, this Court held that personal jurisdiction is not prerequisite to the power of a court to transfer a case under § 1406(a).[4] The decision rested on the premise,

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(a) because, by its terms, that section is applicable only to cases in which venue has been laid in the wrong division or district.

[3] The court deemed it unnecessary, therefore, to consider the government's contentions with respect to § 1406(a). (Pet. A-5.)

[4] Section 1406(a) provides that:

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

earlier articulated in *Internatio-Rotterdam, supra* (218 F. 2d at 518), that where a court has jurisdiction over the subject matter of a case which is timely commenced, it thereby has power to enter orders, including transfer orders, which are necessary to the maintenance of the litigation itself. This, of course, reserves to the defendant full opportunity to contest the merits of a transfer either by special appearance in the transferor court or when served in the transferee district. Since §§ 1404 and 1406 are companion measures, remedial in nature, both designed to facilitate transfers in proper cases "in order that the plaintiff not be penalized by * * * 'time-consuming and justice-defeating technicalities'" (*Goldlawr, supra*, at 467), it seems clear that the rule laid down in *Goldlawr* should apply to transfer motions under the former, no less than under the latter, provision. It is noteworthy that Professor Moore, whom petitioner concedes (Pet. 11-12) to be the father of § 1404 (a), is of the view that failure of service in the transferor district should not bar a transfer to a district where service could be effected. 1 Moore's *Federal Practice* (2d ed.), p. 1791.[5]

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[5] For other commentaries to the same effect, see *Transfer in the Federal Courts in the Absence of Personal Jurisdiction*, 61 Col. L. Rev. 902, 904-905, 907; Note, 61 Mich. L. Rev. 393.

Cases cited by the petitioner (Pet. 22-23) as supporting his position do not, in fact, advance his cause. With the exception of one case—(*King Bros. Productions, Inc.* v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271 (S.D. N.Y.))—all the cited cases were decided prior to *Goldlawr, supra*. In *Goldlawr*, this Court cited with approval *Internatio-Rotterdam, supra*, in which Judge Parker outlined the reasoning which led him to

Petitioner claims support for his position in the legislative history of § 1404(a). Noting that § 1404 (a) was a statutory recognition of the common-law doctrine of *forum non conveniens*, he points out that in each of the four leading pre-statutory cases which applied that doctrine,[6] the moving defendant had been properly served. (Pet. 12-14.) That circumstance, however, proves very little; it merely confirms what would in any case be obvious—namely, that a defendant who had not been properly served would have no occasion to seek dismissal on the ground of *forum non conveniens* when he could achieve the same result by asserting the more basic and easily demonstrable ground of lack of personal jurisdiction. Indeed, since the granting of a motion based upon *forum non conveniens* required dismissal of the action—rather than its transfer as under § 1404(a)—the question whether such a motion could be entertained by a court lacking jurisdiction over the defendant's person was purely academic.

We note, finally, that the issue below was whether the district court had *power* to transfer the case

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hold that personal jurisdiction is not prerequisite to transfer under Section 1404(a). *King Bros.*, decided a few months after *Goldlawr*, did not even remotely involve the question posed here. In *King*, personal service was effected on all defendants, and the issue was whether the procedural law of the transferor court or that of the transferee court should apply.

[6] *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44; *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501; *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518; *United States* v. *Nat. City Lines*, 334 U.S. 573.

under § 1404(a) in the absence of personal jurisdiction over the defendant—a matter wholly distinct from the question whether the convenience of the parties and the interests of justice make transfer appropriate in the particular case.[7] Those of petitioner's arguments which are addressed to the merits of the transfer are therefore of no relevance here.[8]

2. The only court of appeals decision claimed to be in conflict with the decision here is *North Branch Products, Inc.* v. *Fisher*, 284 F. 2d 611 (C.A.D.C.). That case, however, involved neither § 1404(a) nor the absence of personal jurisdiction. There the district court had jurisdiction over the defendant but *sua sponte* dismissed the action on grounds of *forum non conveniens*. The court of appeals reversed on a finding (p. 614) that there was no clear choice of another forum where the defendant would have been amenable to service. Thus, the decision held only that, in order for an action to be dismissed under the

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[7] As the court below stated (Pet. A-6):

> Of course, this [holding] does not mean that this action must be transferred; we hold only that the district court has power to do so if it determines that the considerations set forth in § 1404(a) warrant transfer in the circumstances of this case.

[8] Also not at issue here, since the court below did not pass on it (Pet. A-5), is the government's contention that transfer here is authorized by § 1406(a) because an action commenced in a district in which the defendant is not amenable to service is one "laying venue in the wrong district" within the meaning of that section. As has been noted, process here was effected at the last address which the defendant had made known to the District Director. (R. 33a.)

doctrine of *forum non conveniens*, there must be a second forum in which a suit can be brought. No similar issue is present here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

LOUIS F. OBERDORFER,
*Assistant Attorney General.*

JOSEPH KOVNER,
ROBERT A. BERNSTEIN,
*Attorneys.*

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